IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 571 and 572

ARTHUR T. HORMANN,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, A CORPORATION, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON,

Respondents.

BRIEF OF RESPONDENTS, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HAMILTON MOSES, JR.,
Solicitor for Respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF OF RESPONDENTS, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson, respectfully submit that the petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit be denied and in support thereof submit the following:

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals in and for the Seventh Circuit is reported in 114 F. (2d) (Advance Sheets) 118.

II.

Jurisdiction of This Court.

The brief of petitioner states (Brief, p. 9) that jurisdiction of this court is asked for the single purpose of determining whether or not the Circuit Court of Appeals in and for the Seventh Circuit should have granted petitioner's motion to dismiss the appeal of the respondents, or to affirm the decree. The brief has, however, presented other matters for consideration which were not involved in said motion. Respondents shall through necessity be required to answer such matters though they be beyond the scope of said petition.

III.

Additional Statement of the Case.

Petitioner's complaint (R. 2) filed in the Federal District Court for the Northern District of Illinois, Eastern Division, sounded in law and demanded judgment against the Northern Trust Company upon an alleged indebtedness. The case was, however, subsequently transferred to the equity side of the court by reason of the intervention, with leave of the court, by these respondents. The intervening petition (R. 8) prayed for a construction of the will of Sarah DeLoss and that prayer was, in effect, joined in by the respondent, Northern Trust Company (R. 21) and by the respondents, John Russell and Wilbur Clark Tanner (R. 50). The District Judge, sitting as a Chancellor, heard the evidence and (pursuant to rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States) made findings of fact (R. 71) which were expressly based "upon the evidence heard in open court" (R. 71). The findings set forth the conclusions of the court as to the *facts* proven by the *competent* evidence

and included *none of the evidentiary facts* introduced. The Chancellor prepared and filed with his findings conclusions of law (R. 81) which were introduced by the following statements, "The court further finds and concludes, *as a matter of law,* from said *will* of Sarah DeLoss, deceased, as follows:" (R. 81) (Italics ours), followed by the construction of the will adopted by the Chancellor (R. 81-83) The decree (R. 84) distributed the property held by the respondent, Northern Trust Company, as Trustee, in accordance with the construction of the will embodied in the conclusions of law.

At the close of the trial in open court, the District Judge delivered an opinion (R. 59) in which he first ruled upon the objections of these respondents to certain evidence offered by petitioner (R. 61). The objections were sustained and the Judge then proceeded to give the reasons for his construction of the will. He stated emphatically, *"I do not think that one need go outside the four corners of this instrument, this will* of the testatrix, to find what the testatrix meant; I think it is clear" (R. 61) (Italics ours). When the Circuit Court of Appeals in and for the Seventh Circuit reviewed the decree of the District Court, it agreed with the trial judge that the language of the will, and *that alone,* must be examined to discover the intention of the testatrix. In this regard the court said, "The entire will is before us, and that would seem to be sufficient" (R. 174).

IV.

Reasons Relied On For the Denial of the Writ.

From the foregoing it is apparent that both the trial court and the Circuit Court of Appeals agreed that the factual matters contained *in the findings* and the *language of the will* were all that were essential or proper for the

decision. Respondents submit that petitioner has failed to show that the ruling by the Circuit Court of Appeals on the petitioner's motion to dismiss the appeal or to affirm the decree is in conflict with the decisions of this or any other court.

The ruling of the Circuit Court of Appeals on the motions is supported by the authorities, namely, in holding that (1) the Circuit Court of Appeals could review the decree entered in an *equity* suit to construe a will, upon a record containing the pleadings, findings of fact, conclusions of law and the decree, without the evidence, to determine whether or not the construction of the will adopted by the decree was correct as a matter of law; (2) in an *equity* suit *to construe* a will, the testator's intention expressed in the will is a question of *law* and not a question of fact; (3) it was the duty of the petitioner, (if he desired the Appellate Court to examine the exclusion of the evidence offered by him at the trial) to cause a certificate of evidence to be included in the record.

It is further submitted that the Circuit Court of Appeals did not, as is asserted by petitioner,

(1) rule that the decree and the findings of fact could be reviewed upon the ground that they were not supported by the evidence,

(2) look to the decision of the trial court to ascertain facts or evidence "in lieu of a certificate of evidence",

(3) overlook a pertinent Illinois statute and did not assume the law to be precisely contrary to that statute.

ARGUMENT.

I.

Upon the Record Before the Circuit Court of Appeals In and For the Seventh Circuit, That Court Was Required to Determine Whether or Not as a Matter of Law the Facts Found by the District Court Supported the Decree.

The petitioner does not ask a review of the decision of the Circuit Court of Appeals on the merits, but insists that that court did not have before it a record which would enable it to review the decree. Petitioner fails, however, to understand the nature of respondents' appeal to the Circuit Court of Appeals. Respondents' "Statement of Points" (R. 95) limited the appeal to the sole question whether or not, *on the facts found by the court,* the conclusions of law which construed the will and the decree which carried such construction into effect were erroneous as a matter of law (R. 95). Neither the findings of fact, the sufficiency of the evidence, nor any rulings on the evidence were questioned. The Circuit Court of Appeals is sustained by all the authorities in holding that (on this record containing the pleadings, the findings of fact, the conclusions of law and the decree and none of the evidence) it could and must consider the question raised by the "Statement of Points". Indeed, many of the cases cited by petitioner so hold. See:

Detroit Trust Company v. *Woodworth, Collector,* 110 Fed. (2) 829 (1939 C. C. A. 6) per Allen, J. (Brief, p. 22.)

Hollenbeck v. *Leimert,* 72 Fed. (2) 480 (1934, C. C. A. 7) per Fitz Henry, J. (Brief, p. 22.)

Dalton v. *Hazelet,* 182 Fed. 561-570 (1910 C. C. A. 9) per Ross, J. (Brief, p. 23.)

The cases uniformly hold that upon the record such as was presented to the Court of Appeals the court is not only empowered but also must determine whether on the facts as found by the trial court the judgment or decree is correct as a matter of law.

United States Supreme Court Decisions:

State Farm Mutual Auto Insurance Co. v. *Coughran,* 303 U. S. 485.

Chicago, Milwaukee & St. P. R. Co. v. *Clark,* 178 U. S. 353, 364.

Shipman v. *Straitsville Mining Co.,* 158 U. S. 356, 361.

The Propeller Burlington, 137 U. S. 386, 391.

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Fletcher v. *Laws,* 64 Fed. (2) 163, 165 (C. C. A. D. C. 1933) per Martin, C. J.

American Employers Insurance Co. v. *Franklin Savings and Loan Company of Macon, Georgia,* 89 Fed. (2) 224 (1937 C. C. A. 5) per Holmes, J.

Tatum v. *Davis,* 283 Fed. 948 (1922 C. C. A. 8) per Lewis, J.

In re Los Angeles Lumber Products Co., 100 Fed. (2) 963 (1939 C. C. A. 9) per Healy, J.

Yangtsze Rapid S. S. Co. v. *Deutsch-Asiatische Bank,* 59 Fed. (2) 911 (1932 C. C. A. 9) per Sawtelle, J.

State Decisions:

Cody Trust Co. v. *Hotel Clayton Co.,* 293 Ill. App. 1, 11, 12 N. E. (2) 32.

Maquire v. *Bliss,* 22 N. E. (2) 615 (1939 Mass.).

Atwood v. *Governor,* 8 N. E. (2) 916 (1937 Mass.).

Town of Lexington v. *Governor*, 3 N. E. (2) 19, 21 (1936 Mass.).

Madison County Trust & Deposit Co. v. *Smith*, 182 N. E. 12 (1932 N. Y).

King v. *Stephens*, 215 Pac. 311 (1923 Kans.).

Kansas City and Ft. S. Cement Co. v. *Reese*, 42 Pac. 832 (1895 Kans.).

First National Bank of Aberdeen v. *Crammer*, 175 N. W. 881, (1920 S. D.).

First National Bank v. *Thompson*, 186 S. W. 826 (1916 Ark.).

In re German Ditch & Reservoir Co., 139 Pac. 2, 6-7 (1913 Colo.).

In addition to the foregoing there are three reported State Court decisions in which motions similar to that of petitioner were denied. In each of those cases the record contained only the pleadings, the findings of fact, conclusions of law, and the decree, and the appellees therein contended, (as does petitioner), that in the absence of a Transcript or Certificate of Evidence or a Bill of Exceptions there was nothing before the Appellate Court to review. In the case of *Wyness* v. *Crowley*, 196 N. E. 924 (1935 Mass.) per Rugg, C. J., the Supreme Judicial Court of Massachusetts said, p. 925:

> " 'It must be a rare case where a prevailing party in equity can insist on the printing in full of the evidence, when the appealing party is willing to rest his case before the full court on the pleadings and the report of the material findings by the Judge.' "

In Hegarty v. *National Refining Co.*, 204 Pac. 144, (1921 Kans.) the Supreme Court of Kansas said, p. 145:

> "The appellee filed a motion to dismiss the appeal on the ground that the appellant has not caused a transcript of the evidence to be prepared and filed. * * * The appellant raises no question (affecting the evidence) * * * his sole contention is that judgment should have been rendered in his favor on the special

findings, to determine which no evidence is necessary. The appellee, however, wishes to obtain a review of the decision of the trial court on his demurrer to the evidence and other rulings affected by the evidence. As to these matters the appellee is himself in effect the appellant, and it devolves upon him to procure the transcript." (Parenthesis ours.)

In *Kracke* v. *Cohen et al,* 205 Pac. 13 (1922, Wash.) the Supreme Court of Washington said (p. 14):

> "The respondent has moved to dismiss this appeal * * * The grounds * * * are that the appellant has taken no exceptions to the findings of fact or conclusions of law in a law case tried by the court without a jury, and that no bill of exceptions or statement of facts has been filed with the lower court. * * * The respondent has brought here a short record which shows * * * that * * * the court, after having made its findings and conclusions, entered a judgment in favor of respondent. * * * The motion must be denied. * * * It may be that the appellant will contend that the judgment is not supported by the findings and so we can review that question without either a statement of facts or exceptions to the findings of the court."

These three cases have never been overruled. They are decisive of the petition for writ of certiorari.

II.

In an Appeal From a Decree Construing a Will the Appellate Court Can Determine Whether the Decree Is Correct as a Matter of Law When the Findings of Fact, Though Not the Evidence, Are in the Record. (Reply to Petitioner's Brief, pp. 18-20.)

Petitioner apparently agrees with the principles in the foregoing portion of the brief, but insists that they are not applicable to this case. He reasons that the construction of a will is a question of fact and not one of law and, therefore, unless the evidence is before the Circuit Court

of Appeals that question of fact cannot be determined. Petitioner has cited and respondents have found no case which so holds. In the following cases it has been held that the construction of the intention of a testator expressed in the language of a will is *a question of law* and not of fact:

Preston v. *Foster*, 55 Atl. 558, 559 (1903 Conn.).
Bills v. *Putnam*, 15 Atl. 138, 141 (1888 N. H.).
Bennett v. *Packard*, 39 Atl. 739, 741 (1889 Conn.).
In re Donnellan's Estate, 127 Pac. 166, 168 (1912 Cal.).

Each of the first three of the above cases were actions in equity to construe a will. In each thereof the reviewing court had before it only a record similar as to contents with that which was before the Court of Appeals in the case at bar. From an examination of each thereof it would appear that the lower court had heard evidence which was not in the record upon review, yet the courts each held that that was a record sufficient upon which to review a decree construing a will.

The only two cases cited by petitioner in support of his contention, we submit, are not at all applicable, for both *Perry* v. *Wiggins*, 57 F. (2d) 622 (1931 C. C. A. 8th) and *Bogan* v. *Hynes*, 65 F. (2d) 524 (1933 C. C. A. 9th) were appeals from judgments in actions *at law* which to try title to real estate and were not suits *in equity* for the construction of a will. In each thereof there was a judgment rendered by the court upon a trial where a jury had been waived. The decisions were controlled by Sections 649 and 700 of the U. S. Revised Statutes (28 U. S. C. A. Secs. 773 and 875 respectively) (See Appendix). Section 649 applies *only* to actions at law and not to actions in equity (*Cameron* v. *U. S.* 148 U. S. 301, 305) and Section 700 by its express terms relates only to the causes of action which arise under Section 649, in addition to which in neither of

those cases relied upon by petitioner was the construction of a will involved. In the *Perry* case there was a will involved in the litigation but the court was not called upon to construe the will, and in the *Bogan* case there was no will involved at all.

Respondents therefore respectfully submit that contrary to the contention of petitioner there is no conflict between the decisions of the Circuit Court of Appeals of the 7th Circuit and other Circuit Courts of Appeal.

III.

Upon Their Appeal Respondents Did Not Attack the Findings of Fact Upon the Ground That They Were Not Supported by the Evidence. Petitioner's Citations in Parts II and III of His Brief Are, Therefore, Not in Point. (Reply to Petitioner's Brief, pp. 20-27.)

In Part III of Petitioner's brief he cites cases to the effect that where the evidence is not before the reviewing court it must be presumed that sufficient evidence was adduced below to sustain the decree. Respondents do not take issue with the holdings of those cases or with that statement of the law. Both, however, are inapplicable to the instant case. The statement of points filed by Respondents clearly shows that Respondents did not question the sufficiency of the evidence (R. 95-106). The cases cited in part II of his brief are not pertinent for the same reason and in addition in each of those cases the record lacked not only a Transcript of The Evidence or a Bill of Exceptions, *but also did not contain findings of fact.* Those cases are as follows:

U. S. v. *Archibald McNeil & Sons Co.*, 267 U. S. 302 (p. 20).

Barton v. *Automobile Ins. Co.*, 63 F. (2d) 631, 635 (1933, C. C. A. 1) (p. 21).

Reilly v. *Beekman,* 24 F. (2) 791 (1928, C. C. A. 2) (p. 21).

Fraad Talking Machine Co. v. *Empire Mfg. Co.,* 250 F. 618, 619 (1918, C. C. A. 2) (p. 21) judgment also omitted from record).

Harris, et al v. *U. S.,* 70 F. (2d) 897, (1934, C. C. A. 4) (p. 21-22).

Ford v. *Grimmett,* 278 F. 140, (1922, C. C. A. 5) (p. 22).

Interstate Folding Box Co. v. *Empire Box Corp.,* 68 F. (2) 500, (1934, C. C. A. 7) (p. 22).

Townsend v. *Beatrice Creamery Co.,* 138 F. 381 (1905, C. C. A. 8) (p. 23).

Brown Sheet Iron & Steel Co. v. *Maple Leaf Oil Ref. Co.,* 68 F. (2d) 787, 788 (1934, C. C. A. 8) (p. 23).

American Natl. Red Cross v. *Raven Honey Dew Mills,* 74 F. (2) 160, 162, (1934, C. C. A. 8) (p. 23).

Walton v. *So. Pac. Co.,* 53 F. (2d) 63, 69, (1931, C. C. A. 9) (p. 23).

The record before the Circuit Court of Appeals in the case at Bar *did* contain findings of fact and Respondents accepted them as correct and limited their appeal to the question whether those findings supported the decree as a matter of law. None of the cases cited by Petitioner in Argument II (except those cited in I hereof) and III of his brief are decisions on that question.

IV.

Respondents Had No Duty To Preserve the Evidence in the Record Because Their Appeal Raised No Question Affecting the Sufficiency of the Evidence or Rulings Thereon. (Reply to Petitioner's Brief, pp. 27-31.)

Respondents upon their appeal below assigned no error to the rulings of the Trial Court upon the evidence and they did not contend that the findings of fact were not supported by the evidence. (Statement of Points, R. 95-106.) They accepted the findings of fact as true and correct. Their appeal was directed solely to the construction of the will contained in the conclusions of law and effectuated by the decree. The pleadings, the findings of fact (including the will), the conclusions of law and the decree were the only matters relevant to the errors asserted. The evidence would have burdened the record unnecessarily as it was immaterial to the points to be raised on the appeal.

The Rules of Civil Procedure for the District Courts of the United States contemplate that an appeal might properly be prosecuted upon a record of just this character. Rule 75(d) provides that if an appellant does not include the evidence in the record he shall serve on the appellee a concise statement of points setting forth the matters on which he intends to rely on appeal. The only purpose of that rule is to give the appellee, if he desires it, the opportunity provided by Rule 75(a) to require that the evidence be included in the record. In view of Rule 75(e), had respondents included the evidence they would have subjected themselves to additional expense because that evidence was "matter not essential to the decision of the questions presented by the appeal." When the statement of points was served upon petitioner he should have determined whether the evidence was essential to his side of the case and should then have designated it for inclusion in

the record. But, says petitioner, at that time he examined the decisions, and relying upon the case of *Pulaski-Lonoke Drainage District, et al.* v. *Missouri Pacific Railroad Company*, 44 Fed. (2d) 899 (C. C. A. 8, 1930), concluded that he was absolved of the duty to preserve the evidence. Respondents submit, however, that had petitioner carefully read that decision he would not have arrived at that conclusion. The errors assigned and set forth at page 901 of that opinion, as the Court said, page 901, raised questions of fact:

> "The question presented by these assignments resolves itself into the propriety of the Court's action *in finding* that there had been no change in plans since the judgment * * *." (Italics ours.)

As the *findings* were questioned it was of course necessary for the *appellant* to preserve the evidence in the record. The findings were not attacked in the appeal to the Court below, therefore the duty to preserve the evidence rested upon petitioner and not upon respondents.

V.

The Circuit Court of Appeals Looked to the Decision of the Trial Court To Show That Petitioner's Motion Sought To Repair His Own Failure To Preserve a Record Upon Which He Could Assign Error. The Decision Is a Part of the Record and Can Properly Be Examined. (Reply to Petitioner's Brief, pp. 31-34.)

At page 31 of the brief petitioner contends that the Circuit Court of Appeals improperly used the decision of the District Court "in lieu of a certificate of evidence". Petitioner can, however, ill complain of the court's action because he himself invited it (Point I of petitioner's motion, page 3 of petition) and he urged the admissibility of the evidence at great length in his brief. Thus if error was committed by the Circuit Court of Appeals it was at the

instance of the petitioner. That Court, however, committed no error. It did *not* look to the decision to determine the *substance* of the evidence. It quite properly referred to the decision in order to show that the petitioner's motion was inspired by his failure to preserve errors which *he* and he *alone* desired to assert. The cases cited (pp. 32-34) are not in point. Each involved questions of fact and the court properly refused to examine the trial court's opinion for evidence not in the record. Since those decisions, also, the opinion has become an essential part of the record on appeal (Rules of Civil Procedure for the District Courts of the United States, No. 75(g)), and may now be examined by the Circuit Court of Appeals to discover the reasoning of the trial judge. That judge stated that the language of the will was all that was necessary to his decision. If petitioner thought otherwise he should have placed the evidence before the Circuit Court of Appeals. Respondents submit that the Circuit Court of Appeals committed no error in this respect and the certiorari should be denied upon this point.

VI.

If the Decree Might Have Been Sustained Upon Matters Other Than Appeared in the Record, It Was the Duty of the Appellee To Require That They Be Preserved in the Record for the Circuit Court of Appeals. (Reply to Petitioner's Brief, pp. 34-35.)

Petitioner contends that the Circuit Court of Appeals overlooked the principle that a decree in equity if right for any reason must be affirmed. That Court examined the decree on the record before it. That record contained everything considered by the District Court to be material and competent to its decision. If there were any other reasons not shown by the record for sustaining the decree

it was within the province of the petitioner and it was his duty if he wished to assert them to include them in the record. As petitioner himself has said, it must be presumed that the findings of fact are correct and incorporate all the competent evidence. The converse must also be presumed, namely, that if there was other evidence not incorporated in the findings the trial court excluded it as incompetent. Thus without referring to the decision of the trial court it is obvious that petitioner was attempting by his motion to get before the Circuit Court of Appeals evidence held incompetent by the District Judge and to have that ruling on the evidence reviewed. It is submitted that petitioner's motion was properly denied and that there is no basis for the allowance of certiorari upon this point.

VII.

The Circuit Court of Appeals Properly Applied the Law of Illinois to the Construction of the Will and Overlooked No Pertinent Illinois Statute. (Reply to Petitioner's Brief, pp. 35-36.)

Petitioner insists that in the statement quoted at page 36 of his brief the Circuit Court of Appeals ignored an Illinois statute (Ill. Rev. Stat., 1929, Ch. 3, Sec. 200) (See Appendix), and that its decision was materially affected thereby. Petitioner, however, does not demonstrate the applicability of the statute. The opinion of the Court of Appeals clearly shows that the statement objected to was not material to its decision as it relates to a set of circumstances which did not exist in this case. In that statement the Court by the way of illustration, outlined what disposition would have been made under paragraph 7th of the will had John or Charles predeceased their mother. The fact is that the sons John and Charles survived their mother and, therefore, whether or not their devises would lapse was

not before the Court. The statement of law was, however, correct. The lapse statute of Illinois had no application to this will. The will particularly provided in paragraph 7th against the lapse of legacies and devises. Thus when the Court said that in case of lapse the devise would "become a part of her personal estate" it was construing the effect of paragraph 7th. The section of the statute referred to provides for the disposition of lapsed devises only when "no provision shall be made for such contingency." Such provision was made in paragraph 7th of the will and there was no need, therefore, to resort to the statute and the failure to do so was not erroneous.

Conclusion.

For the foregoing reasons respondents respectfully urge that the writ of certiorari be denied, all of which is respectfully submitted.

HAMILTON MOSES, JR.
Solicitor for Respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson.